

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STUDENTS FOR FAIR ADMISSIONS, INC.,

Plaintiff,

Civil Action
No. 14-14176-ADB

v.

October 23, 2018

PRESIDENT AND FELLOWS OF HARVARD
COLLEGE, et al.,

Pages 1 to 234
SEALED TRANSCRIPT

Defendants.

TRANSCRIPT OF BENCH TRIAL - DAY 7
BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT COURT
JOHN J. MOAKLEY U.S. COURTHOUSE
ONE COURTHOUSE WAY
BOSTON, MA 02210

REDACTED

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Allison D. Burroughs, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on October 23, 2018.)

THE COURT: Do you guys want a sidebar?

MR. MORTARA: Yes, Your Honor.

[The following was held at sidebar. Sidebar sealed.]

MR. LEE: Your Honor, I asked for the sidebar. I raise this issue reluctantly, but I think that I have to. There have been several cross-examinations that have begun by going into the witness' personal backgrounds basically to suggest I know something about you personally. During a jury trial I probably would have objected, but it's Your Honor, it's a bench trial.

It happened again yesterday, and you may recall that Dean Khurana was specifically asked about his parents coming from India and his brothers. If you Google Dean Khurana once, you'll find out that one of his brothers committed suicide just a few years ago. I'm one of the people who know about it. And when he was asked the question, let me show you the transcript:

1 "Question: And what dream were you referring to?

2 "Answer: That my parents left home in India to
3 come to take their children to a place where they hoped there
4 would be more opportunity for them.

5 "Question: And that proven to be true, right?

6 "Answer: Yes.

7 "Question: For you and your two brothers, correct?

8 "Answer: Yes."

9 [REDACTED]
10 [REDACTED]

11 [REDACTED] This case has lots of difficult
12 issues. We understand that. But there is no reason to do
13 this to a witness. It's inappropriate. It's wrong. There
14 was no reason for his brother to come into this case, and I
15 wouldn't be doing my duty to Harvard, but I particularly
16 wouldn't be doing my duty to him, if I didn't mention it to
17 Your Honor.

18 THE COURT: Look, I did not know the story about
19 Mr. Khurana yesterday. And I assumed you were just trying to
20 ask some introductory questions to kind of relax the witness
21 the way we all sort of do, right?

22 MR. MORTARA: That's absolutely, correct, Your
23 Honor. May I go on?

24 THE COURT: Sure.

25 MR. MORTARA: As far as I'm concerned, the purpose

1 of this is to attack my integrity. We informed Mr. Lee last
2 night I had no idea about this. It is not the first thing
3 that comes up when you Google Rakesh Khurana. I've actually
4 got all the Google printouts right here with me right now,
5 but that's beside the point. My word as an Officer of this
6 Court was insufficient for Mr. Lee and his team. No one on
7 our team knew anything about this. And, Your Honor, that's
8 my word to you and to him as an Officer of this Court.

9 My integrity has been attacked, and there's a
10 record being made here which I will ask to be sealed when
11 this is concluded. I would like an opportunity to explain my
12 side.

13 THE COURT: That's fine. We've been sealing as a
14 matter of course all of the sidebars.

15 MR. MORTARA: May I proceed?

16 THE COURT: If you want to make a record, go ahead.

17 MR. MORTARA: I understand. This is very important
18 to me. Ms. Folan and Ms. Daly are listening, and I'd like to
19 make a record.

20 THE COURT: That's fine.

21 MR. MORTARA: This is the first page of my
22 cross-examination outline and I'll waive Word Product to see
23 the first page. You will see absolutely nothing about his
24 brother on this page. You see the thesis and the parents.
25 Why did I raise the thesis? We told Mr. Lee last night why

1 we raised the thesis. The acknowledgments here, which you'll
2 see on this page are actually quite touching about Dean
3 Khurana's family, and I was trying to humanize him to the
4 Court because, frankly, my efforts were to get him to admit
5 that his research and his whole life goal is to improve the
6 socioeconomic diversity at Harvard.

7 I found this passage about his parents deeply
8 moving. Why did I bring up the thesis? I did want him to
9 know that I was aware of the thesis. Elsewhere in the thesis
10 he says things that are very important to our case including
11 he studied the effect of group size on decision making,
12 including that he's done research and cited research to
13 suggest that CEO's have a more difficult time controlling
14 larger boards.

15 This was the entire point of the Ryan committee and
16 the Smith committee. That was my intended reference for
17 this. That's why I used it. Then we have the actual
18 testimony. I wanted to get the parent thing out because
19 that's what I'm trying to do is to humanize him. His own
20 family and their children. I had remembered this passage,
21 had it in my head. And the only reason I mentioned it is
22 because it's right here in this same paragraph. I did not
23 know anything about this. And I'm happy to take the oath for
24 the first time in my life.

25 MR. LEE: Your Honor, let me respond as follows

1 because this is important, and as I said to you I raise it
2 reluctantly. This is not about relaxing witnesses. These
3 are our witnesses who have gotten up, three of them,
4 Mr. Looby, cross-examined by him; Director McGrath,
5 cross-examined by him. They all started with suggestions
6 that he knew information about them that is that is not part
7 of the court record. It's not to relax anybody.

8 It's an old trick that trial lawyers use sometimes
9 effectively to say I know something about you that you don't
10 know. Right? It wasn't to relax Dean Khurana. You could
11 have elicited his background to relax him. That's number
12 one.

13 I did call Mr. Hughes, who we've had a very good
14 relationship with, and raised the question. In fairness to
15 Mr. Mortara, they came back and said this is where it came
16 from. Honestly, Mr. Mortara is correct, we don't believe it.
17 And even if I did, I would still raise it with Your Honor
18 because we just don't need this in this case.

19 There is enough emotional baggage going around in
20 every direction including yesterday. We don't need to take
21 witnesses and bring back their brother's suicide right at the
22 beginning of their examination. The one thing I don't want
23 is I don't want to -- I've left him outside. I don't want an
24 apology.

25 MR. MORTARA: There will be no apology, Your Honor,

1 because --

2 THE COURT: I'm going to accept at face value that
3 you didn't know, but there's not going to be an apology or
4 any reference to it. [REDACTED]

5 [REDACTED]
6 [REDACTED] I take
7 what you say, accept it. This sidebar will be under seal.
8 We won't have any further reference to anyone in his family
9 during his testimony.

10 MR. MORTARA: I won't even reference the thesis,
11 Your Honor.

12 THE COURT: You can reference the thesis but
13 nothing about the dedication, nothing personal. Nothing
14 about his own dreams.

15 MR. MORTARA: Absolutely.

16 THE COURT: In terms of going forward --

17 MR. MORTARA: I don't have any witnesses left in
18 the case except Professor Card.

19 MR. LEE: We all can agree that we'll keep
20 irrelevant personal information out for all of the witnesses.

21 THE COURT: That's what I was going to say.

22 MR. MORTARA: Your Honor, again, I have personal
23 family experience with suicide. I take this extremely
24 seriously. I take the attack on my word really seriously in
25 front of you, in front of Ms. Daly, in front of Ms. Folan,

1 people I've known a short time. In particular, two in here
2 what I've grown to be quite friendly with. I take this
3 extremely seriously, Your Honor.

4 THE COURT: I don't fault him for bringing it up
5 because it's such a sensitive matter. So it's better to
6 address it than let it lie. I will also accept your
7 representation that you didn't know anything about it. He's
8 right, there's plenty of baggage. There's plenty of insults
9 and whatever to go around. If we can just kind of keep that
10 in mind and ratchet it down on the personal stuff unless it
11 appears to be relevant.

12 MR. MORTARA: Thank you, Your Honor.

13 MR. LEE: Thank you.

14 (End of sidebar.)

15 THE COURT: Dean Khurana, I remind you you're under
16 oath.

17 (RAKESH KHURANA previously sworn by the Deputy
18 Clerk.)

19 EXAMINATION (resumed)

20 BY MR. MORTARA:

21 Q. Good morning, Dean Khurana, how are you?

22 A. Good morning.

23 Q. We left off yesterday talking about socioeconomic --

24 A. Yes.

25 Q. -- diversity at Harvard. Do you remember that?

1 experience is what gets us do that point.

2 THE COURT: Okay.

3 MS. CONLEY: Thank you.

4 MR. MORTARA: Your Honor, would you like to take a
5 short morning break or do you want me to get set up and go?

6 THE COURT: Do you have more for him?

7 MR. MORTARA: I do.

8 THE COURT: It's up to you. I'm happy to take a
9 break or I'm happy to forge forward, whatever you want to do.

10 MR. MORTARA: Let's take a five-minute break.

11 Ms. Hacker I think wants to talk to you about depositions.

12 THE COURT: Why don't we take a break until 11:00,
13 then. And anyone who wants to talk about depositions, they
14 can do it over here.

15 (The following was held at sidebar.)

16 THE COURT: The ones that we had not done are
17 Pedrick, Walsh, Weaver and Lopez. Do you want to do some of
18 those now or do them all at the same time at the end of
19 lunch? What do you want to do?

20 MS. HACKER: Whatever is Your Honor's preference.
21 We can wait and do them all at the end of lunch if that would
22 be easiest.

23 THE COURT: I'm ready to go.

24 MS. HACKER: Let do it.

25 THE COURT: Starting at page 8 on Howrigan,

1 overruled. Page 11, all overruled. Page 12, overruled. Is
2 this --

3 MS. ELLSWORTH: It's fixed now.

4 THE COURT: Those are all overruled. Page 15,
5 they're all overruled.

6 Lopez.

7 MS. ELLSWORTH: Lopez is another objection in full.

8 THE COURT: That's all out as far as I'm concerned.
9 I don't see what that -- I'm happy to hear you on it, but --

10 MS. HACKER: As Your Honor knows, SFFA has a racial
11 balancing claim in this case. Ms. Lopez is the sister
12 cochair of an organization called the Association of Black
13 Admissions and Financial Aid Officers of the Ivy League and
14 Sister Schools. What they do is they get together twice a
15 year and have something called a round robin where all of
16 these schools sit a table and read the demographics of each
17 minority of racial and ethnic group in their admitted pool so
18 far, and they share that information with each other. It
19 goes to the racial balance claim that SFFA has in this case.

20 THE COURT: I just don't see it. Unless you can
21 show that it influences what Harvard does.

22 MS. HACKER: It is circumstantial evidence that
23 Harvard -- Harvard wouldn't want these numbers and take these
24 numbers if it didn't have some control over how it is
25 affecting its admitted class and the percentages of these

1 minorities in the admitted class.

2 THE COURT: Out. We have Walsh and Weaver. Let's
3 start with Walsh. Page 8, both sustained.

4 Weaver, so on page 1 --

5 MS. ELLSWORTH: I might have a different version
6 here. Is that the second Weaver? Her deposition stopped and
7 restarted. I'm there. Sorry.

8 THE COURT: That one sort of lost me. This is
9 supposed to be the question, and then this is supposed to be
10 the answer?

11 MS. FASULO: Yes, Your Honor.

12 THE COURT: I think the question is fine which is
13 what you're objecting to. The answer is nonresponsive, but I
14 guess they circle back to it.

15 MS. ELLSWORTH: They get it later.

16 THE COURT: I guess that I'll overrule that one.
17 Page 7, overruled. Page 8, they're all overruled. That's
18 it.

19 MS. HACKER: We'll have two additional transcripts.
20 We'll probably get them to Your Honor tomorrow after we hear
21 from Harvard if there are any objections being withdrawn.

22 MS. ELLSWORTH: The two transcripts are 30(b)(6)
23 transcripts testimony from Dean Fitzsimmons and
24 Ms. Driver-Linn both of which were here as you know. So
25 we're going to take a look at them. We just got them last

1 night. We may be objecting to cumulative.

2 THE COURT: I'm going to extend the break for five
3 minutes to give her a break.

4 (End of sidebar.)

5 (Off the record.)

6 THE COURT: Mr. Mortara, any time you're ready.

7 MR. MORTARA: I'm ready to proceed, Your Honor.

8 THE COURT: Go ahead.

9 FURTHER EXAMINATION

10 BY MR. MORTARA:

11 Q. Okay, Dean Khurana, only a few more questions, I think.

12 Turning back to Plaintiff's 316, the report of the
13 committee to study race-neutral alternatives.

14 Very simple question, sir. Who wrote the first
15 draft of this report?

16 A. Could you just tell me what --

17 Q. You have two binders in front you. One is the one I gave
18 you. One is the one your lawyers gave you. It's got a lot
19 more in front of it. It's got the case caption at the top.
20 It looks like this. I'll grab it.

21 A. Okay. Thank you.

22 Q. This is Harvard's binder, sir.

23 A. I've got it.

24 Q. And the other one is the binder I gave you, and mine is
25 labeled by plaintiff's exhibit number, so you can look at